

OPEN MEETING ITEM



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COMMISSIONERS
JEFF HATCH-MILLER - Chairman
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

ORIGINAL



ARIZONA CORPORATION COMMISSION

22

DATE: June 24, 2005

DOCKET NO: T-03406A-03-0888

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Jane Rodda. The recommendation has been filed in the form of an Opinion and Order on:

UTILITIES DIVISION STAFF v. ESCHELON

(COMPLAINT)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00 p.m.** on or before:

JULY 6, 2005

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Open Meeting to be held on:

JULY 12 and 13, 2005

For more information, you may contact Docket Control at (602)542-3477 or the Hearing Division at (602)542-4250. For more information about the Open Meeting, contact the Executive Secretary's Office at (602) 542-3931.

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BRIAN C. McNEIL
EXECUTIVE SECRETARY

Arizona Corporation Commission
DOCKETED

JUN 24 2005

DOCKETED BY

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 **COMMISSIONERS**

3 JEFF HATCH-MILLER Chairman
4 WILLIAM A. MUNDELL
5 MARC SPITZER
6 MIKE GLEASON
7 KRISTIN K. MAYES

8 UTILITIES DIVISION STAFF,

9 Complainant,

10 v.

11 ESCHELON TELECOM OF ARIZONA, INC.,

12 Respondent

DOCKET NO. T-03406A-03-0888

DECISION NO. _____

13 **OPINION AND ORDER**

14 DATE OF HEARING:

May 11, 2005

15 PLACE OF HEARING:

Tucson, Arizona

16 ADMINISTRATIVE LAW JUDGE:

Jane L. Rodda

17 APPEARANCES:

Michael T. Hallam, LEWIS AND ROCA, LLP,
on behalf of Respondent; and

David M. Ronald, Staff Attorney, Legal Division
on behalf of the Utilities Division.

18 **BY THE COMMISSION:**

19 * * * * *

20 Having considered the entire record herein and being fully advised in the premises, the
21 Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

22 **FINDINGS OF FACT**

23 1. On December 8, 2003, the Commission Utilities Division Staff ("Staff") filed a
24 Complaint against Eschelon Telecom of Arizona, Inc. ("Eschelon" or "Company"). On December
25 16, 2003, Staff filed an Errata to the Staff Complaint. The Staff Complaint alleges that Eschelon
26 violated 47 U.S.C. § 252(e) of the Telecommunications Act of 1996 (the "Act") and A.A.C. R14-2-
27
28

1 1506(A) and (C) by failing to file certain documents with the Commission that Staff alleges are
2 Interconnection Agreements between Eschelon and Qwest Corporation ("Qwest").

3 2. Staff alleged the following documents between Eschelon and Qwest, which had not
4 been filed with the Commission for approval, are Interconnection Agreements that should have been
5 filed:

6 (a) Confidential/Trade Secret Stipulation dated 2/28/00;

7 (b) Trial Agreement dated 7/21/00;

8 (c) Confidential Purchase Agreement dated 11/15/00;

9 (d) Confidential Amendment to Confidential/Trade Secret Stipulation (Amending
10 2/28/00 agreement) dated 11/15/00;

11 (e) Escalation Procedures Letter from Qwest dated 11/15/00;

12 (f) Daily Usage Information Letter from Qwest dated 11/15/00;

13 (g) Features Letter from Qwest dated 11/15/00;

14 (h) Confidential Billing Settlement Agreement dated 11/15/00;

15 (i) Status of Switched Access Minute Reporting Letter from Qwest dated 7/3/01; and

16 (j) Implementation Plan dated 7/31/01.¹

17 3. On December 24, 2003, Staff and Eschelon filed a Stipulation to extend the time for
18 Eschelon to answer the Complaint.

19 4. On May 20, 2004, Eschelon filed a Motion to Dismiss and Answer. Eschelon argued
20 that neither Section 252(e) of the Act or A.A.C. R14-2-1506 explicitly requires that CLECs, like
21 Eschelon, file such agreements, and further that some of the documents identified by Staff are not
22 Interconnection Agreements and thus not subject to filing requirements.

23 5. By Procedural Order dated July 23, 2004, a briefing schedule was established and the
24 matter set for oral argument.

25 6. On September 17, 2004, counsel for Eschelon requested a procedural conference
26

27 ¹ The same agreements were part of an investigation of Qwest's failure to file Interconnection Agreements. That
28 investigation, which involved more than just the Eschelon agreements, ultimately resulted in a settlement approved in
Decision No. 66949 (April 30, 2004) that required, among other things, Qwest to pay penalties of \$9,000,000.

1 during which Eschelon and Staff reported that they were going to engage in settlement negotiations.
2 The procedural schedule was suspended indefinitely by Procedural Order dated September 17, 2004.

3 7. Pursuant to Procedural Orders dated September 17, 2004, October 15, 2004,
4 November 19, 2004, January 6, 2005, and February 9, 2005, the parties participated in a series of
5 status conferences. During the status conference held March 7, 2004, the parties requested at least 30
6 days to finalize and file a written settlement agreement.

7 8. By Procedural Order dated March 15, 2004, the parties were ordered to file a written
8 Settlement Agreement and testimony in support of that settlement, and the matter was set for hearing.

9 9. On April 25, 2005, Staff filed a written Settlement Agreement and the direct testimony
10 of Elijah Abinah in support of the Settlement. On April 22, 2005, Eschelon filed the direct testimony
11 of Dennis D. Ahlers, a senior attorney-director of the Company, also in support of the Settlement
12 Agreement.

13 10. A hearing on the proposed Settlement Agreement convened on May 11, 2005, before a
14 duly authorized Administrative Law Judge.

15 11. A copy of the Settlement Agreement is attached hereto as Exhibit A, and incorporated
16 herein by reference. The Settlement Agreement provides in pertinent part:

17 (a) The Agreements identified by Staff in its Complaint constitute Interconnection
18 Agreements for purposes of this settlement;

19 (b) Eschelon accepts its shared obligation to file and seek Commission approval for all
20 future Interconnection Agreements, whether written or oral. Eschelon agrees that all Interconnection
21 Agreements, whether written or oral shall be filed within 30 days of execution;

22 (c) Eschelon agrees that if an Interconnection Agreement is presently in existence and
23 not yet filed for approval, the Interconnection Agreement will be filed within 45 days of approval of
24 the Settlement Agreement;²

25 (d) Eschelon agrees to pay the State of Arizona an administrative penalty in settlement
26 of this proceeding in the amount of \$80,000, to be paid in two payments of \$40,000 each. The first
27

28 ² Neither Staff nor Eschelon are currently aware of any existing Interconnection Agreements that have not been filed.

1 \$40,000 payment will be remitted within 30 days of an Order approving the Settlement Agreement,
2 and the second payment shall be remitted within 365 days of such Order;

3 (e) Eschelon will comply with section 252 of the Act, A.R.S. §§ 40-203, 40-374, 40-
4 334 and A.A.C R14-2-1112, R14-2-1506 and R14-2-1508; and

5 (f) Eschelon will notify Staff of all future wholesale or commercial Interconnection
6 Agreements, whether written or oral, between Eschelon and ILECs that related to resale,
7 interconnection or the purchase of unbundled network elements in Arizona within 30 days of
8 execution.

9 12. In agreeing to the fine amount, Staff considered Eschelon's number of access lines as
10 compared to Qwest; Eschelon's number of residential and business customers; Eschelon's Arizona
11 revenues; and the number of unfiled Interconnection Agreements. Staff believes that the
12 comparisons between Eschelon and Qwest indicate that the fine agreed to as part of this Settlement is
13 comparable to the fine imposed on Qwest in Decision No. 66949.

14 13. Staff testified that the Settlement Agreement is in the public interest because it
15 clarifies the Company's filing obligations and provides for monetary penalties which address Staff's
16 concerns that precipitated filing the Complaint. Staff testified that resolving the matter through
17 settlement rather than in a contested hearing enables Staff to devote resources to other issues pending
18 before the Commission, and the Settlement eliminates the uncertainty associated with litigation risk.

19 14. Eschelon's obligation to notify the Commission of any "commercial agreements" will
20 help the Commission to monitor the marketplace and protect the public interest by making sure the
21 Commission is aware of all agreements between Eschelon and ILECs for interconnection or the
22 purchase of network elements.

23 15. Only the State of Washington has required Eschelon or any other CLEC to pay a
24 penalty related to the failure to file these agreements. The Washington state fine of \$25,000 is less
25 than the amount Eschelon has agreed to pay in Arizona.

26 16. We concur with the parties that the Settlement Agreement is a fair and reasonable
27 resolution of the issues raised in Staff's Complaint against the Company and should be approved.
28

CONCLUSIONS OF LAW

1. Eschelon is a public service corporation under Article XV of the Arizona Constitution and under Arizona Revised Statutes, Title 40, and the Competitive Telecommunication Rules.

2. The Commission has jurisdiction over Eschelon and the subject matter of the Complaint.

3. Notice of the proceeding was provided in accordance with applicable law.

4. The Settlement Agreement attached hereto as Exhibit A, is a fair and reasonable resolution of the issues raised in the Complaint, is in the public interest and should be approved.

ORDER

IT IS THEREFORE ORDERED that the Settlement Agreement entered into between Eschelon Telecom of Arizona, Inc. and Commission Utilities Division Staff, attached hereto as Exhibit A, is approved.

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1 IT IS FURTHER ORDERED that Eschelon Telecom of Arizona, Inc. shall pay the first
2 installment of the administrative penalty of \$40,000 within 30 days of the effective date of this
3 Decision, and the second installment of \$40,000 within 365 days of the effective date of this
4 Decision, said payments to be made payable to the State of Arizona and presented to the Arizona
5 Corporation Commission.

6 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

7 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.
8
9

10 CHAIRMAN

COMMISSIONER

11
12
13 COMMISSIONER

COMMISSIONER

COMMISSIONER
14

15 IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive
16 Secretary of the Arizona Corporation Commission, have
17 hereunto set my hand and caused the official seal of the
18 Commission to be affixed at the Capitol, in the City of Phoenix,
19 this ____ day of _____, 2005.

20 BRIAN C. McNEIL
EXECUTIVE SECRETARY

21 DISSENT _____
22

23 DISSENT _____
24
25
26
27
28

1 SERVICE LIST FOR:

ESCHELON TELECOM OF ARIZONA, INC.

2 DOCKET NO.:

T-03406A-03-0888

3
4 Thomas Campbell
5 Michael T. Hallam
6 Lewis and Roca, LLP
7 40 North Central Avenue
8 Phoenix, AZ 85004
9 Attorneys for Eschelon

7 Dennis D. Ahlers
8 Senior Attorney
9 Eschelon Telecom of Arizona, Inc.
730 Second Avenue South, Suite 90
Minneapolis, MN 55402-2456

10 Michael W. Patten
11 ROSHKA HEYMAN & DEWULF, PLC
12 One Arizona Center
13 400 East Van Buren Street, Suite 800
14 Phoenix, Arizona 85004
15 Attorneys for McLeodUSA

14 Bill Courter
15 MCLEODUSA
16 P.O. Box 3177
17 Cedar Rapids, Iowa 52406-3177

16 Christopher Kempley, Chief Counsel
17 David Ronald
18 Legal Division
19 ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

20 Ernest Johnson, Director
21 Utilities Division
22 ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER - Chairman
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

UTILITIES DIVISION STAFF,

Complainant,

v.

ESCHELON TELECOM OF ARIZONA, INC.

Respondent.

Docket No. T-03406A-03-0888

SETTLEMENT AGREEMENTPARTIES

The Parties to this Settlement Agreement are the Arizona Corporation Commission Staff ("Staff") and Eschelon Telecom of Arizona, Inc. (Eschelon).

INTRODUCTION

The Parties stipulate to this Settlement Agreement to resolve all matters in dispute between them regarding the Arizona Corporation Commission ("Commission") Complaint in this docket, including all claims, whether known or unknown, related to the subject of or arising from the Complaint with respect to interconnection agreements between Eschelon and Qwest entered into between February 28, 2000 and July 31, 2001. The Parties request a Commission order approving this Settlement Agreement as soon as possible.

1 DEFINITIONS

2 The term "Interconnection Agreement" as used in this Settlement Agreement shall include
3 any agreement required to be filed and/or approved by the Commission pursuant to 47 U.S.C. §
4 252(e) of the Telecommunications Act of 1996 ("the 1996 act") and A.A.C. Rule R14-2-1506.

5 "Eschelon" includes Eschelon, its officers, directors, employees and agents and its parent
6 company.

7 PROCEDURAL HISTORY

8 On December 9, 2003, Staff filed a Complaint against Eschelon. Staff alleged that Eschelon
9 failed, in violation of state and federal law, to file and seek Commission approval for the following
10 Agreements:

- 11 a. Confidential/Trade Secret Stipulation dated 2/28/00
- 12 b. Trial Agreement dated 7/21/00
- 13 c. Confidential Purchase Agreement dated 11/15/00
- 14 d. Confidential Amendment to Confidential/ Trade Secret Stipulation (Amending
15 2/28/00 agreement) dated 11/15/00
- 16 e. Escalation Procedures Letter from Qwest dated 11/15/00
- 17 f. Daily Usage Information Letter from Qwest dated 11/15/00
- 18 g. Features Letter from Qwest dated 11/15/00
- 19 h. Confidential Billing Settlement Agreement dated 11/15/00
- 20 i. Status of Switched Access Minute Reporting Letter from Qwest dated 7/3/01
- 21 j. Implementation Plan dated 7/31/01

22 between Eschelon and Qwest Corporation ("Qwest"), an incumbent local exchange carrier ("ILEC"),
23 as required by 47 U.S.C. § 252(a)(1) and (e), and A.A.C. Rule R14-2-1506. On May 20, 2004,
24 Eschelon filed a Motion to Dismiss and Answer to the Complaint. Eschelon argued that Staff had no
25 cause of action against it. On August 20, 2004, Eschelon filed a Brief in support of the above
26 argument.

SPECIFIC TERMS

Staff and Eschelon agree to the following terms and conditions:

1. For the purposes of this Settlement Agreement only and in the interests of settling the disputes between the Parties, Eschelon stipulates that agreements:

- a. Confidential/Trade Secret Stipulation dated 2/28/00
- b. Trial Agreement dated 7/21/00
- c. Confidential Purchase Agreement dated 11/15/00
- d. Confidential Amendment to Confidential/Trade Secret Stipulation (Amending 2/28/00 agreement) dated 11/15/00
- e. Escalation Procedures Letter from Qwest dated 11/15/00
- f. Daily Usage Information Letter from Qwest dated 11/15/00
- g. Features Letter from Qwest dated 11/15/00
- h. Confidential Billing Settlement Agreement dated 11/15/00
- i. Status of Switched Access Minute Reporting Letter from Qwest dated 7/3/01
- j. Implementation Plan dated 7/31/01

between it and Qwest constitute Interconnection Agreements under current Federal Communications Commission ("FCC") and Commission rules and orders.

2. Staff's position is that federal law and Commission rules and orders require CLEC's to file and seek Commission approval for all Interconnection Agreements, whether written or oral. At this time, both Staff and Eschelon agree that the FCC has not issued a definitive ruling on whether CLEC's have the above obligation under federal law. Eschelon is aware of Staff's position regarding the filing obligations of CLEC's under federal law. Eschelon admits that Commission rules and orders require it to file and seek Commission approval for all Interconnection Agreements, whether written or oral, and Eschelon will do so for all future Interconnection Agreements.

3. Eschelon accepts its shared obligation to file and seek Commission approval for all future Interconnection Agreements, whether written or oral, in compliance with this Settlement Agreement and existing law. Eschelon agrees that all Interconnection Agreements, whether written or oral, shall be filed within thirty (30) days of execution.

4. Eschelon agrees that if an Interconnection Agreement is presently in existence and not yet filed for approval, the Interconnection Agreement will be filed within forty-five (45) days of approval of this Settlement Agreement by the Commission. Neither Staff nor Eschelon is currently aware of any such Interconnection Agreement presently in existence and not yet filed for approval.

5. Either party may give the other party written notice of its belief that a change in the law has affected this Settlement Agreement. Upon receipt of such notice, the parties agree to meet and negotiate in good faith to bring this Settlement Agreement into compliance with existing law. If the parties cannot reach agreement within sixty (60) days of the date notice was given that a change in the law has occurred, either party may petition any state or federal court in Arizona for appropriate relief.

6. Eschelon agrees to pay the State of Arizona an administrative penalty in settlement of this proceeding. This administrative penalty shall be made payable to the State Treasurer for deposit in the General Fund for the State of Arizona. This administrative penalty shall consist of two forty-thousand dollar (\$40,000) payments. The first forty-thousand dollar (\$40,000) payment shall be remitted within 30 days of an order approving this Settlement Agreement. The second forty thousand dollar (\$40,000) payment shall be remitted within 365 days of an order approving this Settlement Agreement.

7. Eschelon shall comply with Section 252 of the 1996 Act, A.R.S. §§ 40-203, 40-374, 40-334 and A.A.C. R14-2-1112, R14-2-1506 and R14-2-1508.

8. Eschelon shall notify the Commission Staff of all future wholesale or commercial telecommunications agreements, whether written or oral, between Eschelon and ILECs that relate to resale, interconnection or the purchase of unbundled network elements in Arizona within thirty (30) days of execution.

GENERAL TERMS

The Parties stipulate to the following general terms of the Settlement Agreement:

1. The Parties agree to use their best efforts to secure the approval by the Commission of the Specific Terms of this Settlement Agreement. The Parties understand that the Specific Terms listed do not apply unless approved by the Commission.

1 2. The Specific Terms of the Settlement Agreement represent an integrated resolution of
2 issues. Accordingly, the Parties recommend that the Commission adopt the Specific Terms of this
3 Settlement Agreement in their entirety. Each party reserves the right to withdraw from the
4 Settlement Agreement if the Commission does not approve the Specific Terms of the Settlement
5 Agreement in their entirety or conditions approval of the Specific Terms of the Settlement Agreement
6 on material revisions to their terms and conditions.

7 3. The Parties agree to provide at least one witness at the time the Settlement Agreement
8 is presented to the Commission to provide testimony in support of the Settlement Agreement and
9 answer any questions the Commission may have. The Parties agree to cooperate, in good faith, in the
10 development of such other information as may be necessary to support and explain the basis of this
11 Settlement Agreement, and to supplement the record accordingly.

12 4. The Parties enter into this Settlement Agreement to avoid further expense, uncertainty,
13 and delay in resolving the issues between them in this docket. By executing this Settlement
14 Agreement, the Parties shall not be deemed to have accepted or consented to the facts, principles,
15 methods, or theories employed in arriving at the Settlement Agreement. The Parties shall not use,
16 advocate or otherwise employ—itsself or in conjunction with any other individual or entity—this
17 Settlement Agreement for disputing, arguing, or resolving any issues in any other proceeding.

18 5. All negotiations relating to or leading to this Agreement are privileged and
19 confidential, and no party is bound by any position asserted in negotiations, except to the extent
20 expressly stated in this Agreement. As such, evidence of conduct or statements made in the course of
21 negotiation of this Agreement are not admissible as evidence in any proceeding before the
22 Commission, any other regulatory agency or any court.

23 6. This Agreement represents the complete agreement of the Parties. There are no
24 understandings or commitments other than those specifically set forth herein. The Parties
25 acknowledge that this Agreement resolves all issues that were raised in the Complaint and is a
26 complete and total settlement between the Parties.

27
28

REQUEST FOR APPROVAL

This Settlement Agreement is presented to the Commission for the Commission's approval. If this Settlement Agreement is approved, it would constitute a full settlement of all issues raised against Eschelon in the Complaint by the Staff with respect to the aforementioned interconnection agreements between Qwest and Eschelon that were entered into between February 28, 2000 and July 31, 2001 and not filed with the Commission.

Dated this 22 day of April, 2005.

ARIZONA CORPORATION COMMISSION

BY:

ESCHELON TELECOM OF ARIZONA, INC.

BY:

Richard A. Smith